IN THE MISSOURI SUPREME COURT

SC85675

STATE ex rel. OSCAR LAZCANO and
WCP PATHOLOGY, INC.,

Relators,

vs.

HONORABLE MARK D. SEIGEL, CIRCUIT JUDGE,
DIVISION 3, MISSOURI CIRCUIT COURT,
TWENTY-FIRST JUDICIAL CIRCUIT, ST. LOUIS COUNTY,

Respondent.

WRIT OF PROHIBITION

BRIEF OF MISSOURI ORGANIZATION OF DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RELATORS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Amicus Curiae Missouri Organization of Defense Lawyers ("MODL") adopts and incorporates herein Relators' Jurisdictional Statement. MODL further files its Brief pursuant to its Motion for Leave to File Brief in accordance with Missouri Rule of Civil Procedure 84.05(f).

STATEMENT OF FACTS

For purposes of its Brief, *Amicus Curiae* MODL adopts and incorporates Relators' Statement of Facts.

INTEREST OF *AMICUS CURIAE*

MODL is a private, voluntary association of Missouri attorneys dedicated to promoting improvements in the administration of justice and to optimizing the quality of the services that the legal profession renders to society. To that end, MODL members work to advance and exchange information, knowledge and ideas among themselves, the public, and the legal community in an effort to enhance the skills of civil defense lawyers and to elevate the standards of trial practice in this state. The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing defendants in civil litigation, including individuals. As an organization composed entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

The statute of limitations issue presented by this writ proceeding generates considerable interest by the Missouri legal, healthcare, and consumer communities. MODL believes that the resolution of the issues presented by this writ proceeding could have a dramatic and substantial impact not only on Missouri tort law, but also on the availability and affordability of healthcare services in Missouri.

MODL believes this Court will benefit from a policy-oriented discussion of some of the broad-based issues presented by this proceeding. Therefore, the purpose of this

brief is to provide the Court with an analysis of some of the issues from the perspective of an organization of attorneys who represent and advise individuals and businesses and defend individuals in tort claims.

POINT RELIED ON

I. THIS COURT SHOULD GRANT RELATORS' WRIT OF PROHIBITION, BECAUSE RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN DISMISSING PLAINTIFFS' MEDICAL MALPRACTICE CLAIM IN THE UNDERLYING ACTION, IN THAT THE CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS, AS SET FORTH IN § 516.105 R.S.MO., AND THIS COURT SHOULD NOT EXPAND THE EXCEPTION IN § 516.105(2), WHICH SETS FORTH THE RECENTLY-ENACTED EXCEPTION TO THE TWO-YEAR STATUTE OF LIMITATIONS FOR THE FAILURE TO INFORM THE PATIENT OF TEST RESULTS, TO INCLUDE A SITUATION WHERE TEST RESULTS ARE IN FACT COMMUNICATED, BUT THE RESULTS MAY BE ERRONEOUS, BECAUSE SUCH AN EXTENSION IS NOT SUPPORTED BY MISSOURI LAW, WHICH HAS REPEATEDLY REJECTED A BLANKET "DISCOVERY RULE" FOR MEDICAL MALPRACTICE CLAIMS AND RECOGNIZES THE PROHIBITION AGAINST STALE CLAIMS AND MISSOURI PUBLIC POLICY, WHICH RECOGNIZES THE IMPORTANCE OF AFFORDABLE HEALTHCARE IN THE STATE.

Weiss v. Rojanasathit, 975 S.W.2d 113 (Mo. 1998)

Section 516.105 R.S.Mo.

Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. banc 1968)

ARGUMENT

I. THIS COURT SHOULD GRANT RELATORS' WRIT OF PROHIBITION, BECAUSE RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN DISMISSING PLAINTIFFS' MEDICAL MALPRACTICE CLAIM IN THE UNDERLYING ACTION, IN THAT THE CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS, AS SET FORTH IN § 516.105 R.S.MO., AND THIS COURT SHOULD NOT EXPAND THE EXCEPTION IN § 516.105(2), WHICH SETS FORTH THE RECENTLY-ENACTED EXCEPTION TO THE TWO-YEAR STATUTE OF LIMITATIONS FOR THE FAILURE TO INFORM THE PATIENT OF TEST RESULTS, TO INCLUDE A SITUATION WHERE TEST RESULTS ARE IN FACT COMMUNICATED, BUT THE RESULTS MAY BE ERRONEOUS, BECAUSE SUCH AN EXTENSION IS NOT SUPPORTED BY MISSOURI LAW, WHICH HAS REPEATEDLY REJECTED A BLANKET "DISCOVERY RULE" FOR MEDICAL MALPRACTICE CLAIMS AND RECOGNIZES THE PROHIBITION AGAINST STALE CLAIMS AND MISSOURI PUBLIC POLICY, WHICH

RECOGNIZES THE IMPORTANCE OF AFFORDABLE HEALTHCARE IN THE STATE.

Introduction

The issues raised in this proceeding are of great interest and importance to members of the healthcare community. *Amicus curiae* MODL wishes to provide this Court with its unique perspective as an organization whose members are involved in the representation of healthcare professionals in litigation involving claims based on medical negligence.

In this brief, MODL will address Plaintiffs' argument that the failure to inform exception should be expanded to encompass claims that allege that the wrong result was communicated. MODL will not address Plaintiffs' separate argument concerning continuing care, because this Court's recent decision in *Montgomery v. South County Radiologists, Inc.*, 49 S.W.3d 191 (Mo. 2001), reaffirms that this exception does not apply to facts such as those alleged in the underlying action.

Statute of Limitations for Actions Against Healthcare Providers Represents Public Policy Choices to Ensure Available and Affordable Healthcare

Since 1921, the Missouri Legislature has treated medical malpractice causes of action differently from other tort actions. Prior to 1921, the limitations period for medical malpractice actions was covered by the general language for "all actions," and litigants

were provided a five-year statute of limitations. Then, in 1921, and continuing through the present, the Missouri Legislature fixed a lesser time limitation, two years. *See* § 516.140 R.S.Mo. In 1968, in *Laughlin v. Forgrave*, 432 S.W.2d 308 (Mo. banc 1968), this Court strictly applied § 516.140, holding that the statute commenced to run from the date of the act of neglect, which was leaving a foreign object in the patient's body during surgery. After *Laughlin*, the Legislature repealed § 516.140 and enacted § 516.105 in 1976. Section 516.105 provided that in cases where the act of neglect complained of is introducing and negligently permitting any foreign object to remain within the body of a living person, the statute commences to run from the date of discovery. For all other cases, however, the Legislature chose to keep the language in § 516.105 virtually identical to its predecessor, § 516.140, which required medical malpractice actions to "be brought within two years from the date of the occurrence of the act of neglect complained of."

Thus, while the limitation periods for actions for libel, slander, assault and other torts begin to run when the resulting damages are sustained and capable of ascertainment, the Missouri Legislature determined that the limitations period for actions against healthcare providers should run immediately from the act of neglect complained of. *Id*. at 313-14. This legislative history, particularly the shorter limitations period and the earlier commencement date, shows a deliberate and time-honored deference to healthcare providers. That deference is a product of Missouri public policy. As exemplified by the enactment of § 516.105 in response to *Laughlin*, the Legislature has responded to certain

situations by creating exceptions to the statute of limitations for actions against healthcare providers. However, it has purposely limited these narrow exceptions to ensure that affordable healthcare is available to the citizens of Missouri.

Recognizing this public policy, Missouri courts have consistently rejected constitutional attacks on the special statute of limitations and earlier commencement date for actions against healthcare providers. *See Laughlin*, 432 S.W.2d at 314; *Ross v. Kansas City General Hospital and Medical Center*, 608 S.W.2d 397 (Mo. banc 1980); *Wheeler v. Briggs*, 941 S.W.2d 512 (Mo. banc 1997); and *Green v. Washington University Medical Center*, 761 S.W.2d 688 (Mo. App. E.D. 1988). As this Court said in *Laughlin*, 432 S.W.2d at 314:

> The legislative branch of the government has the power to enact statutes of limitations and inherent in that power is the power to fix the date when the statute commences to run. Statutes of limitations are favorites of the law and will not be held unconstitutional as denying due process unless the time allowed for commencement of the action and the date fixed when the statute commences to run are clearly and plainly unreasonable. [Citations omitted.] Plaintiff has not demonstrated, and we perceive no reason why, how or in what respect the date and time fixed by the statute are unreasonable. We hold that it fixes a reasonable date from which the statute

> commences to run and accords and limits a reasonable time thereafter within which malpractice actions may be brought; that for these reasons the statute does not deprive plaintiff of due process of law.

Because they embody important legislative policy choices, statutes of limitations must be strictly construed. Judicial exceptions, assuming they are permissible at all, must be narrowly tailored so as not to negate the limitations period.[1]

Further Reforms Reflect Public Policy to Ensure Availability of Affordable Healthcare

In 1986, the Missouri Legislature enacted the provisions of Chapter 538 in an effort to address a malpractice insurance crisis in the healthcare industry, which in turn

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[1] The state is interested "in providing a statute of limitations to protect medical care providers from tort liability based on stale evidence and to provide them with a period of repose after which they can rest easy with the comfort that they can no longer be sued." *Wheeler v. Briggs*, 941 S.W.2d 512, 518 (Mo. 1997) (Holstein, C.J., dissenting in part and concurring in part). Thus, statutes of limitations are favored by the law and cannot be avoided unless the party seeking to do so brings himself or herself within some exception. *Hunter v. Hunter*, 237 S.W.2d 100, 104 (Mo. 1951). Therefore, such exceptions are matters of public policy for determination by the General Assembly. *Id.*

threatened the availability and affordability of healthcare services. *Adams By and Through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 904 (Mo. banc 1992), *cert. denied*, 506 U.S. 991 (1992). These provisions included a liability cap on non-economic damages (§ 538.210 R.S.Mo.); a provision allowing for future damages to be paid in periodic or installment payments (§ 538.220 R.S.Mo.); and a modification of traditional joint and several liability (§ 538.230 R.S.Mo.). This Court noted that these statutory provisions treat healthcare providers "much differently than any other kind of tortfeasor who might be involved in a negligence lawsuit." *Adams*, 832 S.W.2d at 904. This Court further noted, "the statute represents an effort by the Legislature to reduce rising medical malpractice premiums and in turn prevent physicians and others from discontinuing 'high risk' practices and procedures." *Id*. In rejecting constitutional challenges to these statutory enactments, this Court explained that "the preservation of public health and the maintenance of generally affordable healthcare costs are reasonably conceived legislative objectives. . . ."

The Failure to Inform Exception

In 1998, this Court decided the case of *Weiss v. Rojanasathit*, 975 S.W.2d 113 (Mo. 1998). In *Weiss*, the patient brought a medical malpractice action against a gynecologist, who allegedly failed to inform the patient of the results of a diagnostic test.

The test results were abnormal and revealed a precancerous condition. This Court discussed the history of §§ 516.140 and 516.105, set forth above, and ultimately held that the plaintiff's claim was barred under the two-year statute of limitations in § 516.105. This was so even though the statute had run even before the precancerous condition developed into a cancerous condition. This Court explained on page 121 as follows:

> To summarize, this Court is constrained by the language of section 516.105 from adopting any of the discovery theories urged by Ms. Weiss. The general assembly evidenced its clear intent to limit a discovery rule to cases concerning foreign objects. That is its prerogative. This Court must follow the policy determination expressed here.

However, in its conclusion in *Weiss*, this Court invited the Legislature to act if it was dissatisfied with the result in *Weiss*.

Apparently, the Legislature was dissatisfied, because in 1999, House Bill No. 274 was introduced. House Bill No. 274 was the result of a collaborative effort by the plaintiff's bar and healthcare providers to address the situation in *Weiss* where the patient was not informed of diagnostic test results. The purpose of this Act was "[t]o repeal 516.105, RSMo 1994, relating to statute of limitations for actions against health care providers, and to enact in lieu therof one new section relating to the same subject." The language in § 516.105, which was approved by the Legislature, states as follows:

> (2) In cases in which the act of neglect complained of is the negligent failure to inform the patient of the results of tests, the action for failure to inform shall be brought within two years from the date of discovery of such alleged negligent failure to inform, or from the date on which the patient in the exercise of ordinary care should have discovered such alleged negligent failure to inform, whichever date first occurs; except that, no such action shall be brought for any negligent failure to inform about the results of medical tests performed more than two years before the effective date of this section. . . .

However, the Committee notes to House Bill No. 274 state the true purpose of the amendment to § 516.105, as follows:

> PROPONENTS: Supporters say that the current 2 year statute of limitations for medical malpractice actions is unjust when a provider is rewarded for keeping silent about failing to inform a patient of medical test results. The substitute's proposed exception to the 2 year limitations period is narrow and will not cause hardship to health care providers.

Thus, the purpose of the amendment was to provide a narrow exception based on the healthcare provider's never informing the patient of medical test results, which was the

precise fact pattern in *Weiss*. The overbroad interpretation of the language as suggested by plaintiffs below would result in the exception swallowing up the rule. The inevitable end result to such a broad interpretation would be a "discovery rule" for virtually all medical negligence actions due to the universal practice of using diagnostic testing in the healthcare profession as a basis for the provision of almost all healthcare. The Missouri Legislature has historically rejected the adoption of a discovery rule for malpractice actions. *See Laughlin, supra*. Moreover, Missouri courts have deferred to the Legislature's determination that the discovery rule should not be applied in actions against healthcare providers. *See Weiss, supra*.

Current Healthcare Crisis

Given the current atmosphere in Missouri regarding medical malpractice reform, it is hard to conceive that the Legislature intended such a broad reading of the language of the statute. It is widely known that Missouri is now undergoing significant tort reform to curtail the skyrocketing medical malpractice insurance premiums of healthcare providers. For instance, Senator Delbert Scott is sponsoring Senate Bill No. 1094, which modifies many statutes affecting actions against healthcare providers. Included are proposed changes to § 508.010 R.S.Mo., which would restrict venue in all tort actions, including torts for improper healthcare, and revisions to § 516.105, which would change the tolling period for a minor to bring an action based on improper healthcare.[2] This bill

2 Section 516.105 R.S.Mo. currently provides that a person less than 18 years of age

is currently in its infancy, having undergone a second reading in the Senate on January 20, 2004, and having thereafter been referred to the Senate Judiciary and Civil & Criminal Committee, where a hearing was conducted on it on January 26, 2004.

Similarly, the House of Representatives is currently considering similar reforms in House Bill No. 1304. House Bill No. 1304, among other reforms, reduces the amount of the statutory cap on non-economic damages, reduces the number of caps available to a plaintiff, and limits recovery against a healthcare provider who provides emergency care. Despite the fact that these bills are currently in their early stages, their mere existence shows that members of the General Assembly are concerned about the healthcare crisis in Missouri and are proposing legislation to impose restrictions on medical negligence litigation while still providing plaintiffs reasonable access to the courts. This will presumably aid in controlling insurance costs, which are forcing both insurers and practitioners out of the state and in some cases out of the healthcare business altogether. *See* Kathleen Pinkham and John Keane, *Testimony for Missouri Department of Insurance Hearing on Medical Malpractice*, October 30, 2002.

The current healthcare crisis reinforces the principle that exceptions to the statute of limitations must be strictly construed. Statutes of limitations embody important legislative policy choices. In enacting the amendment to § 516.105, the Missouri

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has until the age of 20 to bring the action. The revision would provide that a minor under six years of age has until his 8th birthday to bring a cause of action.

Legislature clearly limited the new exception to the two-year statute of limitations to situations where the healthcare provider failed to inform the patient of test results. The exception does not encompass situations such as here, where the healthcare provider is alleged to have reported the wrong result. The Missouri Legislature's decision not to adopt the discovery rule in such a situation should be honored.

CONCLUSION

Based on the foregoing, *Amicus Curiae* Missouri Organization of Defense Lawyers respectfully suggests that a permanent writ of prohibition should issue in the present case.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 84.06(C) AND (G)

Robyn Greifzu Fox, the undersigned lead attorney of record for *Amicus Curiae* Missouri Organization of Defense Lawyers in the above-referenced appeal, certifies pursuant to Rules 84.06(c) and (g) of the Missouri Supreme Court that:

1. The Brief complies with the limitations contained in Rule 84.06(c);

2. The Brief, excluding cover page, signature blocks, certificate of compliance, and certificate of service, contains 3,935 words, as determined by the word count tool contained in Microsoft Word 2000 software with which this Brief was prepared; and

3. The diskette accompanying this Brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned is virus free.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of the foregoing brief and one copy of accompanying disks were mailed, postage prepaid, to the following this 1st day of March, 2004, to: Mr. T. Michael Ward, Brown & James, P.C., Attorneys for Relators, 1010 Market Street, 20th Floor, St. Louis, Missouri 63101; Mr. William M. Wunderlich, William M. Wunderlich & Associates, Attorneys for Respondent, 1504 Gravois, High Ridge, Missouri 63049; and Mr. Daniel L. Mohs, The Stokely Group, L.L.C., Attorneys for Respondent, 4387 Laclede Avenue, St. Louis, Missouri 63108.

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